



Update on ACCC assessment of NBN Co's SAU variation

Introduction

The purpose of this statement is to provide an update on the ACCC's consideration of NBN Co's proposed variation to its special access undertaking (the SAU Variation).

On 22 June 2017, NBN Co submitted the SAU variation to the ACCC under section 152CBG(2) of the *Competition and Consumer Act 2010* (CCA). The main purpose of the SAU variation was to incorporate the three additional technologies under the multi-technology mix (MTM) model – fibre-to-the-node (FTTN), fibre-to-the-building (FTTB) and hybrid fibre coaxial (HFC) – into the SAU.¹ This variation followed the previous SAU variation that NBN Co lodged with the ACCC in May 2016, and subsequently withdrew. Under the framework specified in Part XIC of the CCA, the ACCC must either accept or reject the proposed SAU variation.

In October 2017, we put our assessment of the SAU variation on hold while NBN Co consulted with its customers about the pricing of its services and then implemented a number of pricing initiatives. We extended the decision making period on three occasions while this occurred.²

During this time, we have had a number of discussions with NBN Co regarding the SAU variation and NBN Co's pricing initiatives. We expressed some concerns with the SAU variation and, as a result, NBN Co has decided to withdraw the SAU variation.

This statement sets out our key concerns with the SAU variation, including our views on the original objectives of the SAU, our concerns around the pricing framework and some of the non-price matters set out in the variation.

Our objectives when accepting the SAU

When we originally accepted the SAU, we recognised the potential for NBN Co's incentives to change significantly over the long term horizon of the SAU. We considered it was necessary for the SAU to include revenue constraints, price controls and mechanisms for regulatory oversight to ensure the efficient use of the network, encourage certainty in retail markets and provide protections to consumers and businesses using the NBN.

The revenue constraints incorporated into the SAU limit NBN Co to recovering only its prudent and efficient costs, and no more, for the duration of the SAU. The combination of the large initial capital outlay by NBN Co, initial under-recovery of costs and uncertainty about future demand and revenue had the effect of creating incentives for NBN Co to invest and incur expenditure efficiently.

In addition to the revenue constraints, the SAU also provided for certain price controls which would set maximum regulated prices and restrict NBN Co's ability to increase prices of its services year-on-year. By specifying the maximum price caps in the SAU, and restricting price increases, access

¹ The proposed SAU variation does not propose to incorporate fibre-to-the-curb (FTTC) into the SAU.

² The ACCC extended the decision making period in January, April and July 2018, each time for a period of three months.

seekers had some certainty about pricing and the risk of price shocks for consumers and businesses on the NBN would be reduced.

The initial prices set out in the SAU, also provided us with reassurance that the pricing framework would allow for a smooth transition from legacy networks to the NBN for customers who wanted to continue receiving services of similar price and quality.

The SAU provides a role for the ACCC to periodically review whether price structures and relative price levels should be re-balanced in a revenue-neutral manner, to have oversight of the withdrawal of products and to intervene on the initial price of newly developed and introduced products. This level of regulatory oversight is important to ensure that the original objectives of the SAU can be achieved.

When accepting the SAU, we considered that it would deliver a framework for the regulation of NBN Co's services which, among other things:

- Ensures consumers and businesses would be able to receive services that are of equivalent quality and price of legacy services – and would pay more for higher quality and higher speed services,
- Allows for vigorous retail competition,
- Provides NBN Co with the opportunity to earn a reasonable return on its investment, subject to efficient investment and adequate demand for its services,
- Provides incentives for NBN Co to operate and invest efficiently, but also to innovate and invest to offer improved services / capacity over time in response to market demand, and
- Provide the ACCC with key oversight roles in relation to pricing and product withdrawal to provide protection for access seekers and end-users against NBN Co pricing or withdrawing products in a way that does not promote the long-term interests of end-users over the longer term.

Pricing concerns arising from the SAU variation

The SAU variation proposed extending these price and revenue controls and regulatory powers across the MTM technologies used to deliver the NBN (aside from FTTC) until 2040. Although the SAU variation did not propose changes to the price controls or initial prices set out in the SAU, our assessment of the matters set out in the variation highlighted some concerns about the pricing framework.

Since the SAU was originally accepted, NBN Co has responded to market developments and increased demand for data by introducing a number of pricing initiatives through a discount mechanism. These discounts are set out in the 'Discounts, Credits and Rebates List' published by NBN Co, but which does not form part of the SAU or Wholesale Broadband Agreement. The recent pricing initiatives include the Focus on 50 promotion, and NBN Co's various bundled offers, which combine AVC products with certain amounts of CVC per end-user.

Since their introduction, these discounts have improved end-user experience, as was highlighted through the improved congestion outcomes following the introduction of the Focus on 50 promotion. The use of discounts also allows NBN Co the flexibility to respond to market demands or changes in a timely way.

However, implementing price changes through the discount mechanism means that the bundled offers or promotions are outside of the SAU framework and the price controls (which apply to the

maximum regulated prices) do not apply. This means that NBN Co is able to increase the discounted prices (up to the price caps) at any time, subject to the notice period listed in the relevant discount notice. We are concerned that this undermines a central objective of the SAU which is to ensure certainty for access seekers and to minimise price shocks for consumers and businesses using the NBN.

The products established through discount notices are not NBN offers under the SAU which means that the additional protections, such as the product withdrawal restrictions, do not apply. As such, NBN Co is able to withdraw the bundled offers or promotions, or significantly alter the composition of the products, without consultation with or agreement from the ACCC. This outcome is inconsistent with the intent of the SAU to ensure stability and certainty in downstream markets. While the bundled offers and promotions that have been introduced will benefit consumers who want premium products, it may result in a detrimental impact on those consumers who are price sensitive or who want to obtain a service on the NBN that is of equivalent quality and price of legacy services. The high bandwidth bundles incentivise access seekers to provide higher value products, while the entry-level bundle is aimed at voice-grade services. The combination of these initiatives may have the effect of reducing the range of services in the market, or reducing the quality of basic, lower speed products (i.e. plans based on the 12/1 and 25/5 Mbps products).

There is a risk that price conscious consumers and consumers with low data usage needs may be forced to choose between a more expensive service, a service generally suitable for voice services or poorer quality services based on unbundled products, which may have insufficient CVC and increased congestion. This outcome would be inconsistent with the general principle of ensuring there is a range of products in the market that meet the needs of consumers. It also undermines the objective of the SAU to ensure services of equivalent price and quality to legacy services are available on the NBN.

In assessing NBN Co's SAU variation, we must be satisfied that the pricing arrangements are reasonable and likely to remain reasonable until 2040. NBN Co's use of discounts to introduce pricing initiatives has highlighted challenges with the regulatory protections in the SAU. We acknowledge that in addition to the protections set out in the SAU, the ACCC also has powers under Part XIC of the CCA.

Non-price matters

We also have reservations regarding NBN Co's proposal to include new non-price terms and conditions relating to co-existence and remediation. Specifically, we are concerned about the application of NBN Co's proposed co-existence and remediation provisions, as there is potential for services to be delivered at significantly lower rates for an extended time period. We accept that this is unavoidable to some extent due to technical limitations. However, we are concerned that under the proposed provisions there is potential for the co-existence provisions to be used to refuse some trouble tickets and, in the case of remediation, end-users may have to pay for higher speed services when the line is not capable of achieving those speeds before remediation is completed. This is likely to have a direct effect on the experience of end-users.

We acknowledge that NBN Co has made positive changes to the proposed provisions to address concerns previously raised by the ACCC. We also accept NBN Co's reasoning behind the need for co-existence and remediation provisions within the SAU. However, we will need to give further consideration to the broader arrangements for co-existence and remediation (including more detailed provisions in the WBA) in the context of the promotion of the long term interests of end-users. It may be more appropriate to address the above concerns outside the SAU framework, and

we note that the ACCC is also considering this matter in the broader context of its NBN wholesale service standards inquiry.

Next steps

We are committed to working with NBN Co on a way forward with the SAU to address our concerns. As set out above, our main concern is about the framework for regulating prices over the longer term and ensuring that the framework is effective to continue to meet the objectives of the SAU.

We will continue to monitor developments, including the end of the Focus on 50 promotion, transition to high speed bundles, introduction of entry level and fixed wireless bundles and the impacts on customers remaining on unbundled products.